APPENDIX 1

(Excerpts from testimony of Richard A. Unger cited at p. 33 above)

Mr. WHIPPLE. Now, your Honor, we have two sample shoes here. I am prepared to have Mr. Unger take this shoe and show you how the shoe manufacturer would deal with it in connection with one of these flow lines on the chart, if that would enlighten your Honor. It won't take long.

It will show you the ways in which alternative processes and sub-processes are available to the shoe manufacturer in one stage in making this particular shoe. It won't take more than a minute or two. I would like to have Mr. Unger do it. I hope it will give content and meaning to the graphic presentation.

The COURT. If it will only take that long, you may proceed.

* * *

Q. What chart are you referring to in describing this?
A. Chart IV, the Lasting Methods chart.
Q. Do you have that chart before you?

Mr. WHIPPLE. I was addressing my question to Mr. Unger, your Honor, but I hope you do, too.

A. The shoe that we are going to——

Q. Wait until his Honor gets it before him. Then I want you to take it step by step, in your own way. You may proceed. A. The shoe that we have is a flat lasted shoe. The shanks have been staple lasted. The foreparts of the shoe have been cement forepart lasted. It is a one-piece, high heel, novelty shoe, and we will take it down through the Lasting charts.

Appendix 1

This shoe, being a flat lasted shoe, will be processed by the flat lasting shoe method portion, the lasting method portion entitled A FLAT. That is a process indicated to the left of the chart LASTING METHODS.

Inasmuch as it is a machine lasted shoe we will take the left-hand branch immediately below the diamond at the head of the chart. This will be following the red portion, the primary path or flow of shoes Flat Lasted. About 66 per cent of all the shoes Flat Lasted are machine lasted.

The next choice that is to be made for the whole flat lasting chart is a division between conventional footwear and canvas rubber footwear, the Autoclave method, this being the so-called example, this so-called conventional method, 52 per cent of the total flat lasted production, we will take the left-hand branch of that alternative.

The next choice the shoe manufacturer has is whether or not he will fasten the insole or not. This is shown by the dotted line connecting the box No. 1 entitled FASTEN INSOLE to that left-hand primary branch of Flat Lasting.

Q. The dotted line connoting an optional operation? A. Yes, that is correct. Almost all the conventional footwear manufacturers or so-called conventional manufacturers fasten their insole. A very, very small per cent, less than one per cent, do not.

This particular shoe had the insole fastened to the last.

The next choice that the manufacture has is a choice as how this shoe is going to be assembled to the last. The next alternative choice that he has is as to whether or not he is going to ASSEMBLE & BACKPART MOULD SEAT LAST this particular shoe by using A-3 operation on the left-hand branch of this next alternative, or whether he will take the most usual choice in 1964 which was to

dip the counter, the fiber counter, and then assemble the shoe to the last as a separate operation, or to preform the back part using operation A-1, which is a secondary choice within that primary choice, preforming the backpart using a multiple counter, and then subsequently assembling the shoe to the last using machine operation No. 3. It is difficult to tell usually as to whether or not an assembled backpart moulding is done or whether dipping the counter and then assembling is done without tearing the shoe apart. I do know that there is a tack hole in the lining of this particular shoe, which would indicate to me that it had been assembled with the use of a machine, operation No. 3. Therefore, undoubtedly this particular operation used the right-hand branch, either dipping the counter or using a preformed backpart. I can't tell if it is a fiber counter or a moulded counter.

* * *

The WITNESS: But, at any rate, it was use of the right-hand branch of that alternative and in connection with the Machine Operation No. 3 assembly.

We are now ready for the next operation which could include conditioning of the box toe or the printing on of a box toe as an optional operation. This is a soft box and thereby it was not conditioned, I don't believe with a——

Q. You are indicated the shoe; is that correct? A. This particular shoe. I could not tell with any great degree of certainty without tearing the shoe apart.

Q. Mr. Unger, keep your voice up, will you please? You are really trying to reach the court room and not just

me. Thank you. A. But on the assumption that a solvent-type box toe was used, I assume that, that means Operation No. 4, conditioning of the box toe, was used as an optional operation by this particular shoe manufacturer rather than the printing on of a box toe using the operation of A-4.

The next optional operation is that of softening the toes. This is an operation which, by the use of steam, softens the upper material to facilitate the pulling-over operation which is the next operation.

In this operation of pulling-over the manufacturer once again has another choice that he has at his disposal as to how this particular operation is going to be performed. He can either pull over and toe last the shoe as a combined operation as denoted by either the A-5, pull last with integral cementing, or the alternative to that for the combined operation of A-2, cement, and separate operation A-6, pull last with separate cementing. Both of those particular alternatives give the shoe manufacturer the alternative of doing the combined operation of pulling over and toe lasting.

In 1964, most shoe manufacturers in flat lasting performed the operation of pulling over as a separate operation.

I would assume that this particular shoe was done this way. I can see the tack marks in the upper material showing where the pulling over tacks were inserted to hold the shoe prior to toe lasting.

In the next step we find that the manufacturer has another alternative as to how he is going to side last his shoe. There are several alternatives at his disposal. He can perform the operation A-7 way to the left of the chart entitled, "Staples," or he can use the alternative metallic side lasting operation of A-8, tacks.

Appendix 1

Most high heel shoes, of which this is an example, use one or the other of these metallic fastening methods. Most of them, as is shown in the chart, 20 percent out of the 21 percent that was estimated to be processed by these two metallic alternatives for side lasting—20 percent of most high heel shoes. This 20 percent joins the 45 percent of the total flat lasted production which does not have a metallic shank lasting operation performed. And upon the diversion of 9 percent of hand side lasting for the canvas rubber footwear autoclave process and the addition of the 20 percent to the remaining 36 percent with a diversion of 9 percent hand side lasting, we have 56 percent of all flat lasted shoes estimated to have cement forepart lasting or cement side lasting.

The same machines shown here can be used either for cement side lasting or cement forepart lasting. Inasmuch as we have already shank lasted the staples and we have the forepart lasting to be performed, we are only talking about that portion, that use of these operations for forepart lasting.

The manufacturer has a choice as to whether he will do this forepart lasting with cement by the separate cementing alternative or the integral cementing alternative. Most manufacturers in 1964 used the alternative of the integral cementing.

As to this shoe, from the amount of cement that is on the side of it, the appearance of the cement, I would say it was lasted with the integral cementing alternative.

We have now lasted the shoe in the shanks and in the forepart. The next operation to be considered is heel seat lasting. At this point we have another alternative. Up at the head of the chart we had considered the alternative that the manufacturer had of performing operation A-3, as-

semble and backpart moulding, as an alternative to the assembling operation. If that manufacturer had chosen that particular alternative, he would have already heel seat lasted this shoe.

Now, back to where we are for the heel seat lasting; he would take the dotted line going to the left which shows that 4 percent bypass the heel seat lasting operation by virtue of having already seat lasted this shoe in Operation A-3.

Inasmuch as we have already determined this particular shoe had not been assembled in backpart moulding, we will have one of the two alternatives of heel seat lasting with tacks or with cement. The presence of a ring of tacks in the heel seat of this shoe indicates that 42 percent of the manufacturers of flat lasted shoes in 1964 chose—as this particular manufacturer chose also—the heel seat lasting operation No. 8 using tacks as a fastening means.

We have now completed the shoe except for the toe lasting—we have completed the lasting method except for the toe lasting portion; and at this point the manufacturer, once again, has the alternative of softening the toes once again to facilitate the lasting, toe lasting operation. Most manufacturers use the toe softening operation. The next choice is as to whether or not he's going to trim out the box toe and lining as an alternative operation or whether, if the shoe has combined lining or is unlined, this particular operation is not required.

This particular shoe is a lined shoe, leather lined shoe, and so is 18 percent of the manufacturers in 1964 manufacturing a flat lasted shoe, this particular shoe would have the box toe and linings trimmed out to facilitate the toe lasting operation.

It should be pointed out in this operation, as others, that in taking this particular one he does not necessarily

have to use the machines available for this particular machine operation.

6 percent of the people, 6 percent of the manufacturers trimmed out the box toe and lining by hand and 12 percent did it by machine.

Following trimming out the box toe and lining, we have the operation of applying the cement to the insole. The Operation A-16 completes the flat lasitng of this particular shoe, flat lasted shoe.

APPENDIX 2

(See Fn. 8 at p. 28 above)

2. With reference to machine count plaintiff has deliberately and systematically misstated United's share by adhering blindly to the 1949 formula based on a different market.

This effort centers in the tables identified by Mr. Epstein; he produced the material for the discussion at pp. 14-20 of the Government brief. From this material, by a series of eliminations and exclusions, plaintiff wrongly concludes that United's position in the sample shoe factories in 1963, with respect to the 18 leading categories, was practically the same as it was in 1947-9 (Govt. Br. 31).[3] Nothing could be more false.

First for the Epstein testimony.

Mr. Epstein did not claim to be an impartial expert. He participated "in the adoption of the theory of the case" (SM 339); did "not have complete autonomy" but was part of the staff (SM 397); and, as the Court perceived, "acted pursuant to a joint arrangement with Miss Brass" (SM 447). In this capacity he consented to represent the facts according to the Government's theory of the case, in the following manner:

> (a) Taking for the foundation of his machine count those United machines published on current terms at January 2 1964 (i.e. Ex. P-47), he excluded from his analysis any machines outstanding in factories of 100 models withdrawn by United before 1964 (SM 410-1). The result was to eliminate also all non-United machines similar to those models (SM 428).

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[3]The 1963 percentages at Govt. Br. 31 are an egregious misuse of evidence, because they are based on Ex. P-264 which was admitted only for the limited and different purpose of showing the need for a projection (SM 1799-1800).

(b) He also excluded United machines which at January 2 1964 were still distributed, subject to the obtaining of terms on application (SM 413, 422).[4] The effect again was to eliminate similar non-United machines.

(c) He further excluded non-United home-made machines in place in the shoe factories (SM 379), and the Government brief maintains that position notwithstanding the Court's clear indication that these are competitors for the purposes of this hearing (SM 381, 383).

(d) In obeying the theory of the Government case as a member of the staff, Mr. Epstein threw out the important innovation of the thermalaster for cement side lasting made by International Shoe Machine Corporation (SM. 425), and the Government adheres to that position notwithstanding this Court's intimation of disagreement (SM 426) and the recognition of that machine by the First Circuit Court of Appeals as "a technological break-through which produced spectacular commercial success for plaintiff [International]" (our Main Brief 46-8 [pp. 23-4 of the foregoing brief]). See also at p. 14 [17a] below.

(e) Pursuant to the theory elaborated in the Government brief Epstein also took out of his count 1057 competitive direct mold vulcanizing machines (SM 343, 429-30).

(f) In order to eliminate competitive machines Mr. Epstein misused the "Q" marking which defendant supplied in connection with the analysis of its machinery

[4] TOA or "Terms on Application" is a stage in the withdrawal of United models (our Main Brief 10-1).

sample, at the request of the Court itself.[5] That is, he consciously disregarded United's written interpretation of the meaning of the "Q" symbol in connection with the machinery classification Ex. D-6 which he was utilizing (SM 448-9). Conceding that he had no personal knowledge of shoe machine operations and could not himself determine whether a non-United machine was really competitive with the defendant's product, he chose to disregard the written description which was forwarded to Government counsel by defendant's counsel April 8 1966 in connection with the delivery of two print-outs requested by the Government (Ex. D-62):

"In this classification the following standard has been applied in designating non-United machines

[5]This letter "Q" prefixed to certain marks applicable to competitive machines under the column "Sym[bol]" in Ex. D-6 and other print-outs is described by Mr. Snow as a classification of the United Operating Departments "where they determined that the machine was not similar to United machines" (Snow SM 641). In pre-trial November 9 1965 the Court requested counsel to cooperate in analyzing the constituents of the United sample. Government counsel asked for this saying that they did not have the necessary expertise "to be able to say which competitive machines should be eliminated" (Pre-Trial Hearing 11/9/65 p. 13). After much colloquy the Court urged United to undertake the work of classifying the machines in the 1963 sample in accordance with the Government's request, without prejudice to our position that technological changes have altered the market (p. 19). At the next pre-trial hearing we submitted a memorandum developing our contention that the major and minor groupings of 1947-9 were no longer applicable and that fitting of the 1963 census into those categories would be a distortion for comparative purposes. At that pre-trial hearing on December 14 1965 the controversy as to the proper classification of United's sample was continued. The Court reserved judgment as to the correct analysis of the market for the purpose of measuring workable competition today (p. 51) and expressed its desire to get as much agreement as possible on the underlying facts without regard to what were the proper "pigeonholes" (pp. 51-2).

as competitive. A non-United machine is considered competitive when it performs in the same or a different way: (a) one or more of the operations performed by a United machine, or (b) one or more operations to accomplish the same function of shoe manufacture as is accomplished by one or more United machines performing a different operation or operations.

. . . The enclosed print-outs designate the corresponding United machine by its machine symbol in all cases except for those bearing the "Q" designation in the print-outs; *those are spelled out in the accompanying supplemental list entitled 'Non-United Machines Which Are Competitive With One or More USM Machines But Are Not Identified By USM Symbols On Attached Print-Out.'* Please understand that both in these print-outs and in the supplemental list the designation of United machine is not an exhaustive or all-inclusive one, *so that the respective non-United machine is or may be competitive with other United machines than those listed."* (italics supplied)

Mr. Epstein ignored these reservations for curious reasons.[6]

(g) The Epstein calculation was made also in disregard of the express reservation of United's counsel,

[6]See SM 448-9. They were "certainly worthy of consideration"; required penetrating thinking on his part; he "had been guided by the original designation as being accurate . . . because why should they tell the Government that a machine was competitive if it was not?"; so he disregarded these reservations "but only after a good deal of soul searching."

in communicating the classification of the 1963 census to the Government in the form of the 18 and the 12 machine categories, "that we [United] do not consider this classification a correct one for the purpose of measuring market share, that since 1949 the significance of the 30 classes as among themselves has greatly changed, and that whether in 1949 or in 1963 the classification would involve some arbitrary judgments" (SM 344-6). We recognize that for some purposes the 18 and 12 classification had to be made. That is, we felt obliged to accede to the Court's request in the pre-trial hearings that United lend its best judgment to the endeavor so that a comparison could be made between 1963 and 1949 *within the categories,* as the Court desired. Our point here is that the Government has pushed to an unconscionable degree the advantage it thinks it got by our so acceding to the Court's request, and has misused United's classification for an end result of distortion which defeats its very purpose.[7]

The result of these seven operations of Mr. Epstein is a mere travesty of the 1963 shoe machinery distribution. The Court recognized its artificiality as the testimony came in (SM 328-9), and with respect to the whole basis of the Government effort said at SM 350:

> "I have been thoroughly persuaded that the kinds of Tables which were used in my original Opinion

[7]Note Miss Brass's argument at SM 346 "that United in its print-out did classify and did put these machines into the categories as representing their best estimate . . ." etc.; and the contention at Govt. Br. 44 that United "has thereby recognized the appropriateness of these category descriptions with respect to the C-Day market."

> were not the best possible way of measuring the market, although they may have been the best that was offered at that time, and I would think it a grave error if I followed that same method now."

At the conclusion of the Epstein evidence the Court refused to strike his exhibits saying (SM 442)

> ". . . it is drawn from some but not from enough primary facts."

This is too kind a comment. In reality the upshot of the Epstein evidence and those portions of the Government brief based thereon is completely misleading and was intended so to be. Conceptually it is an absurdity, because the market analysis tendered by Mr. Epstein as a participant in the theory of the Government case is that, the more competition succeeds and the more of its original machine models United withdraws from the market, the greater the number of competitors' products comparable to the withdrawn models are excluded from the picture; the ultimate result, if indefinitely continued, would be to leave United alone in the field with a single model like the injection molding machine, with which competitors had nothing comparable, and United by that token would be a "monopoly" with 100% occupancy of its particular market. From the viewpoint of the users of shoe machines, *amici curiae* in their brief express the objection with felicity and with force (p. 21):

> "Thus, to ignore machines simply because they are not being currently offered by United, is to exclude from consideration the very developments which the decree was intended to stimulate. By excluding the new offerings of United's competitors, the Gov-

ernment is arbitrarily eliminating at the outset the very developments which would indicate an erosion of United's market power."

The degree of the distortion thus accomplished is startling. Mr. Epstein succeeded in excluding 3083 non-United or competitive machines as against 179 United machines, of a total of 3262, being more than 25% of the entire 1964 census count (SM 342).

The Epstein method was carried also into what the Government calls its shipment exhibits (Ex. P-60 etc.), and the figures at Govt. Br. 18-21 are vitiated by the same errors. By these erroneous methods Epstein reduced the 615 machines entering the sample factories 1963-4 by 182 units. Of the number so eliminated, only three were United machines and 179 were shipments by competing manufacturers (including 17 ISMC cement side lasting machines and 42 vulcanizing machines). In addition, of course, it is obvious the quantities involved are too small to support the percentages erected thereon at Govt. Br. 20.

In support of what we have said about this basic and systematic error of the Government presentation, we add the following:

(i). The Court's original standards were not as bad as the Government's present utilization of them causes them to appear. In other words, no other data were submitted in the main case for comparison with or correction of the OMIR and deposition testimony which Government trial counsel then employed as the basis for their exhibits. No alternatives were offered by defendant. Indeed, none other was available in the absence of substantial competitive forces (other than Compo) in the 1947-9 market. The error consists in carrying

the 1947-9 market structure into the present market as a Procrustean measure.

(ii) The exclusions of United and non-United machines made in the Government exhibits of 1949 were small and offsetting, because, as explained by Government counsel in the second day of these hearings, 364 machines distributed by United were eliminated as against 254 non-United machines (SM 347-8). This was a rough balance and did no harm.

(iii) The Government's exclusion of direct mold vulcanizing machines as no proper part of the market here under review is erroneous. The *amici* brief at pp. 21-2 demonstrates the error. The necessity of taking into account such vulcanizing machines is shown also by the concession of Government counsel about the injection molding machine as part of the market (SM 92-3). The competition of injection molding with the vulcanizing process was recognized by the witness Hardy at SM 90 and 93-4. Mr. Marcy's testimony (SM 1036-51, 1063-80, 1134-41, 1148-56), with the exhibits D-78 and D-578 (photographs) produced and described by him, shows a close similarity and almost complete substitutability of shoes of different constructions.[8] It shows that footwear with rubber soles vulcanized to a

[8]The Govt. Br. 25 statement that Marcy testified that canvas upper shoes, while comparable to fabric upper with rubber or plastic soles "do not compete with, for example, men's dress shoes" does not accurately paraphrase his testimony. He said that men's dress shoes compete equally if they are pre-molded, injection molded, or made by the cement process. He was then asked, "if they compete equally among those three, do they compete equally with the canvas upper?" He responded, "No, not the same shoe." (SM 1153). This is an obscure answer; but the important point is that the three constructions first described are comparable to a standard welt (golf shoe) or a stitch-down dress shoe (SM 1046, 1050; Ex. D-78, B-3, C-1, C-2, C-3).

fabric upper, as well as a leather upper, are part of the shoe industry just as much as the so-called conventional shoes (SM 1079-80).

Direct mold vulcanizing is not just another way of making sneakers, as the Government would have the Court believe. As James H. Cheek testified, rubber and rubber compounds have in the decade here involved largely replaced leather for outsoles and heels (SM 1361). In these circumstances it was inevitable that new methods of attaching rubber and compound soles and heels would be developed. Henry Hardy, of IVC and Compo, first saw the direct mold vulcanizing operation and machine in a French shoe factory making shoes with leather uppers (SM 153). Gordon Cooper sold IVC's Desma machine to shoe factories for work with leather as well as fabric uppers and to factories which replaced earlier sole-attaching methods with direct mold vulcanizing (SM 982-5). Mr. Cheek's company, Genesco, Inc., adopted an earlier method and equipment and later Desma and CIC equipment in shoe factories producing leather upper shoes and making such shoes by other sole-attaching methods; and it distributes these shoes through the same channels as all others (SM 1372-6). All this evidence makes somewhat ridiculous the Government attempt to liken the operations to autoclave, to limit its products to fabric-rubber of the sneaker type, and to exclude from shoe factories those making direct mold vulcanized shoes with either leather or fabric uppers. As Mr. Cheek said, the Bureau of Census definition of fabric-rubber producers and rubber factories may be all right for the Census, but the Genesco factories producing these shoes are shoe factories (SM 1377-8, 1396).

Indeed the Court said during the hearings (SM 670-1):

> "I might as well put on the record what I said off the record, that as presently advised I regard any factory which manufactures shoes as a shoe factory. . . . I think we should exclude what was excluded before as a rubber factory . . . But that is all I have intended to exclude so far."

Colloquy of counsel with the Court at SM 778-98 led to the inevitable conclusion by the Court that the language of the Decree as modified was very broad and included every kind of factory which made footwear (SM 796). Any other conclusion would have involved the absurd result that during the decade under review with respect to an increasing number of shoe factories that utilized direct mold vulcanizing machines for a process increasingly popular United was not restricted by the Decree at all—an absurdity which Government counsel refused to confront (SM 791) and still seeks to escape.

(iv) As regards the ISMC thermalasters which Mr. Epstein excluded, the Government brief continues to insist that they are not competitive with United machines (p. 74), contrary to the evidence of the witness Becka (SM 34), and contrary also to Ex. P-158. This latter exhibit, an affidavit by J. S. Kamborian, describes the thermalaster models B, D and E, introduced in 1956-8, as competitive with two models of United's staple side laster, two models of its cement forepart laster and its Model C platform cover laster (Ex. F to P-158).